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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1939

No. 571

LLOYD N. COBBLEDICK, Individually and as Vice-President of Cobbledick-Kibbe Glass Company, a Corporation, and COBBLEDICK-KIBBE GLASS COMPANY, a Corporation,

*Petitioners,*

vs.

THE UNITED STATES OF AMERICA.

No. 572

A. H. BRAWNER, Individually and as Officer and Director of W. P. FULLER & Co., a Corporation, and W. P. FULLER & Co., a Corporation,

*Petitioners,*

vs.

THE UNITED STATES OF AMERICA.

No. 573

EUGENE PALMUTH, Individually and as President of CROWE GLASS COMPANY, a Corporation, and CROWE GLASS COMPANY, a Corporation,

*Petitioners,*

vs.

THE UNITED STATES OF AMERICA.

## PETITIONERS' BRIEF

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vs.

THE UNITED STATES OF AMERICA.

## PETITIONERS' BRIEF

## INTRODUCTORY STATEMENT

These three cases present identical questions; they were disposed of by the District Court in one ruling,

and by the Circuit Court of Appeals in one opinion. The three records, page for page, are identical except for the difference in the names of the parties. Each record reference herein given, therefore, refers to all three records.

## OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 62) is not yet reported.

## JURISDICTION

The judgments of the Circuit Court of Appeals were entered November 28, 1939 (R. 66). The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347).

## STATEMENT OF THE CASE

On November 2, 1939, a subpoena duces tecum was issued out of the District Court of the United States for the Northern District of California to each of the individual petitioners (R. 5). Each subpoena commanded the person named therein to produce documents belonging to the corporations of which the individuals were officers before the Federal Grand Jury which was making an inquiry in said district into alleged violations of the antitrust laws. Petitioners, the individuals subpoenaed and the corporations of which they were officers, filed motions to quash the subpoenas on the grounds that the subpoenas were oppressive, unreasonable, and invalid, and in violation of petitioners' constitutional rights (R. 10). The District Court,

after hearing, denied the motions, and separate appeals were taken to the Circuit Court of Appeals (R. 43). That court dismissed the appeals on the ground that the order appealed from in each case was not a "final decision" within the meaning of section 128(a) of the Judicial Code (R. 62, 66). This Court granted certiorari because of conflict with the decision of the Circuit Court of Appeals for the Second Circuit.[1]

## SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the order of the District Court is not a final decision within the meaning of section 128(a) of the Judicial Code.

2. In dismissing the appeals from the order of the District Court.

## SUMMARY OF ARGUMENT

I. Under the Judicial Code, all final decisions in the District Courts are appealable.

II. The decision of the District Court herein was final. It terminated an independent proceeding between the parties and left nothing for the District Court to do but to enforce it. It meets the tests of finality applied by the decisions of this Court and adopted without exception by the Circuit Courts of Appeals.

III. The decision of the District Court herein could not have been interlocutory. There was no pend-

[1] *In re Cudahy Packing Co. of Chicago, Ill.*, 104 F. (2d) 658.

ing proceeding in which it could have been interlocutory, and it could not be interlocutory in a criminal proceeding which might be brought in the future, or in contempt proceedings which might follow it. So far as the corporate petitioners are concerned, they could not be parties to a contempt proceeding, and on any theory the decision of the District Court denying their motions was necessarily final.

IV. The practical arguments suggested by the Ninth Circuit Court of Appeals, and more properly addressed to Congress than to a court, in fact emphasize the incorrectness of the conclusion reached by that Court.

## ARGUMENT

### I. Under the Judicial Code, all final decisions in the District Courts are Appealable.

Section 128(a) of the Judicial Code provides:

"The Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—

First. In the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title."

### II. The decision of the District Court herein was final. It terminated an independent proceeding between the parties and left nothing for the District Court to do but to enforce it. It meets the tests of finality

**applied by the decisions of this Court and adopted without exception by the Circuit Courts of Appeals.**

The controversy between the parties to this appeal was confined to the question whether certain evidence should be produced. The Court decided it should, and left nothing further in controversy between the parties. This was a final determination of a matter affecting the "parties to the particular controversy."[2]

This Court has stated repeatedly that a decree is final "when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined."[3]

The Ninth Circuit Court of Appeals, in its opinion (R, 64), indicated that the District Court's order was not final, as there might still remain contempt proceedings which could be brought if the appellants should "disregard the subpoenas." But any order of any court can be challenged by disregarding it, or by risking contempt proceedings, and an order is not for that reason less final.

Even if the Ninth Circuit Court of Appeals thought the appellants, by disregarding the subpoenas, could have renewed their objection in appealing from commitments for contempt (after their presentment by

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[2] *Brush Electric Co. v. Electric Imp. Co.* (1892), 51 Fed. 557, 561.

[3] *St. L., I. M. & S. R. R. Co.* v. *Southern Ex. Co.* (1883), 108 U. S. 24, 28;
*Ex Parte Norton* (1883), 108 U. S. 237, 242;
*Winthrop Iron Co.* v. *Meeker* (1883), 109 U. S. 180, 183;
*Berman v. United States* (1937), 302 U. S. 211, 212-213.

the grand jury to the court as contumacious witnesses, an order of court directing them to comply, their subsequent refusal to do so, and an order of court adjudging them in contempt and committing them),[*] the denial of appellants' motions to quash is nevertheless final. It is unnecessary to satisfy the statutory requirement of finality that the decision be *res adjudicata* of the question involved. In *Weston* v. *City Council of Charleston* (1829), 2 Pet. 448, this Court said (p. 464):

> "If it [the term final judgment] were applicable to those judgments and decrees only in which the right was finally decided, and could never again be litigated between the parties, the provisions of the section would be confined within much narrower limits than the words import, or than Congress could have intended. Judgments in action of ejectment, and decrees in Chancery, dismissing a bill, without prejudice, however deeply they might affect rights protected by the Constitution, laws or treaties of the United States, would not be subject to the revision of the Court. A prohibition might issue, restraining a collector from collecting duties, and this Court would not revise and correct the judgment. The word "final" must be

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[*] Contrast this suggestion of the Ninth Circuit with the rule that "errors must be corrected by appeal and not by disobedience."

*Brougham* v. *Oceanic Steam Navigation Co.* (1913), 205 Fed. 857, 860;

*Brotherhood of Ry. and S. S. Clerks, etc.* v. *Texas & N. O. R. Co.* (1928), 24 F. (2d) 426, 427;

*Wise* v. *Mills* (1911), 220 U. S. 549.

understood in the section under consideration, as applying to all judgments and decrees which determine the particular cause."

Contempt proceedings are only a means of inflicting punishment or enforcing obedience, and one of the means contemplated when it is said that an order is final when nothing remains to be done but to enforce it. A contempt proceeding, moreover, is no part of the proceeding between the original parties, but is a separate proceeding to which the Court is itself one of the parties.[5]

The decisions of this Court establish that the test for determining whether an order denying a motion to quash a subpoena or to withhold or withdraw evidence is appealable or unappealable, is whether the order terminates an *independent proceeding* or is merely interlocutory *in a pending case*.[6]

The Circuit Court of Appeals for the Ninth Circuit, differing with that for the Second Circuit,[7] undertook (R. 63) to distinguish several decisions of this court[8]

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[5] *Michaelson* v. *United States*, 266 U. S. 42, at 64.
*Hayes* v. *Fischer*, 102 U. S. 121 at 122.

[6] *Cogen* v. *United States* (1929), 278 U. S. 221;
*Go-Bart Co.* v. *United States* (1931), 282 U. S. 344;
*Burdeau* v. *McDowell* (1921), 256 U. S. 465;
*Perlman* v. *United States* (1918), 247 U. S. 7;
*Ellis* v. *Int. Com. Comm.* (1915), 237 U. S. 434;
*Alexander* v. *United States* (1906), 201 U. S. 117.

[7] *In re Cudahy Packing Co. of Chicago, Ill.* (1939), 104 F. (2d) 658.

[8] *Perlman* v. *United States* (1918), 247 U. S. 7;
*Go-Bart Co.* v. *United States* (1931), 282 U. S. 344.

from the cases at bar, on the ground that in each of the decisions of this court, the appeal was from an order denying an application for the *return* of papers, while in the cases at bar the appeal was from an order denying motions to quash subpoenas requiring *production* of papers.

This distinction is merely formal. In all the cases the issue is whether the government is to have the citizen's documents. It cannot matter whether the citizen instituted a proceeding for the recovery of property, or a proceeding to protect the possession of property he still held. In each case the thing in controversy was the right of the government to the possession and use of the citizen's documents. In each case the denial of the motion terminated the litigation on the merits. This Court has not intimated that it makes any difference what particular form a proceeding of this sort takes, but has, on the contrary, assimilated "applications to suppress a deposition * * * to compel the production of books or documents * * * for leave to make physical examination of a plaintiff, * * * or for a subpoena duces tecum."[*]

The nebulous character of the Ninth Circuit's attempted distinction can be readily demonstrated. Where the government seeks to secure under a subpoena duces tecum the possession of a citizen's documents, the Ninth Circuit Court says that the denial of the motion to quash is not final and appealable because the citizen can thereafter, disregard the subpoena, be committed for contempt, and then appeal from the commitment. Where the government official already has possession, however, and a motion for the return

[*] *Cogen* v. *United States* (1929), 278 U. S. 221, 223-224.

of the documents is granted, this Court holds that the order is appealable at once.[10] Yet it is clear that the government official, as well as the citizen, has it fully within his power to refuse to obey the order, be committed for contempt and then appeal from the commitment. The delivery of documents is the gist of the action in both cases, there is no essential difference in the proceedings, and the reasoning behind the cases holding that an order for the delivery of documents by the government official to the citizen is appealable, is equally applicable to the delivery of documents by the citizen to the government official. "At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen. And in the development of our liberty insistence upon procedural regularity has been a large factor."[11]

Whether the order of a district judge on a motion to withhold or withdraw documents is a final order is not to be determined by whether the suit is for the recovery of property. The same rule governs the finality of an order in proceedings to recover property in the custody of the court as governs the finality of an order in pro-

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[10] *Burdeau* v. *McDowell* (1921), 256 U. S. 465.

[11] Brandeis and Holmes JJ dissenting on the merits in *Burdeau* v. *McDowell* (1921), 256 U. S. 465, 477. The United States comes into its own courts on the same footing, with regard to practice and procedure, as an ordinary litigant. *First Nat. Bank* v. *United States* (D. C., Mo. 1932), 2 F. Supp. 107, 108; *Kehoe* v. *Commissioner of Internal Revenue* (3d C.C.A., 1939), 105 F. (2d) 552, 556; *United States* v. *National City Bank of New York* (2d C.C.A., 1936), 83 F. (2d) 236, 238, certiorari denied, 299 U. S. 563.

ceedings to keep it from the court. If no other suit has yet been instituted, the order is final and appealable; if a suit is pending or an indictment has been returned, the order is merely interlocutory.

This distinction is indicated by *Cogen v. United States, supra.* Cogen's papers had been obtained from him illegally. When he applied for an order for their return, *an indictment had already been found.* The order denying his application was therefore held to be interlocutory, and an appeal was refused. In other cases[12] involving exactly the same situation, except for the deciding fact that no indictment had yet been returned, the applications for the recovery of the documents were held to be independent proceedings, and the orders thereon final and appealable. In another case,[13] it was the United States attorney who appealed from an order for the return of certain documents to a prospective defendant. The order was held final and appealable because no indictment had yet been returned to which it could be interlocutory.

*Perlman* v. *United States*, supra, was cited by the Ninth Circuit Court of Appeals as involving an appeal "from an order denying an application for the return of papers * * * and to enjoin the use thereof as evidence" (R. 63). An examination of the facts shows that such was not the case. Documents belonging to Perlman and produced at a former trial in which he had served as a witness were impounded in the custody of the clerk. The United States attorney obtained an order directing the clerk to produce the exhibits before

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[12] *Go-Bart Co.* v. *United States* (1931), 282 U. S. 344; *In re Milburne* (1935), 77 F. (2d) 310.

[13] *Burdeau* v. *McDowell* (1921), 256 U. S. 465.

the grand jury and give him access to them. Perlman thereupon petitioned the court to *restrain the government's attorney from using the documents.* So much of Perlman's petition as related to the recovery of the documents was withdrawn and never ruled upon. The petition amounted, in effect, to a "motion to quash" the order giving the United States attorney access to the exhibits. It is hard to see, therefore, how the Circuit Court of Appeals could have regarded the order denying this petition as "a judgment or decree dismissing a suit or proceeding for the recovery of property" (R. 63). The case was strictly analogous to our own, except that in our case the district court denied a motion to quash a *subpoena* giving the United States attorney access to documents. Both cases involved the government's access to documents.

The rule heretofore stated, that a proceeding upon a subpoena is an independent proceeding unless instituted in connection with another proceeding pending before the court, has been supported without exception, so far as we have been able to determine, by the decision of this Court and of the circuit courts of appeals.[14] And

[14] *Interstate Commerce Comm.* v. *Brimson* (1894), 154 U. S. 447;

*Interstate Commerce Commission* v. *Baird* (1904), 194 U. S. 25;

*Janssen* v. *Belding-Corticelli* (1936), 84 F. (2d) 577;

*In re Cudahy Packing Co. of Chicago, Ill.* (1939), 104 F. (2d) 658;

*Ellis* v. *Int. Com. Comm.* (1915), 237 U. S. 434. This case is closely analogous to the situation here. In both cases the question involved was whether the witness was legally required to respond to the subpoena. In these cases the question was raised by motions to quash; in the *Ellis* case by a petition to enforce compliance.

an order to produce, or an order quashing a subpoena, has always been held appealable when it was in itself the only controversy between the parties then before the court.[15]

An examination of the cases denying an appeal from an order to produce, or sustaining a subpoena duces tecum, shows that, without exception, the order was made in connection with a proceeding pending either before the court or before an examiner appointed by the court.[16]

The survey we have made of the decisions of United States courts compels the conclusion that the opinion of the Second Circuit Court of Appeals in *In re Cudahy Packing Co. of Chicago, Ill.*, supra, is an accurate statement of the law. It is consistent with every decision of this Court, and finds its only conflict in the present decision by the Circuit Court of Appeals for the Ninth Circuit.

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[15] *Ellis* v. *Int. Com. Comm.* (1915), 237 U. S. 434; *First National Bank of Mobile* v. *United States* (1925), 267 U. S. 576 (entertaining an appeal from 295 Fed. 142);
*Brownson* v. *United States* (1929), 32 F. (2d) 844;
*Janssen* v. *Belding-Corticelli* (1936), 84 F. (2d) 577;
*In re South State Street Bldg. Corporation* (1939), 105 F. (2d) 680;
*Atlanta Enterprises* v. *Crawford* (1927), 22 F. (2d) 834.

[16] *Alexander* v. *United States* (1906), 201 U. S. 117;
*Nelson* v. *United States* (1906), 201 U. S. 92;
*Coastwise Lumber & Supply Co.* v. *United States* (1919), 259 Fed. 847;
*Tucker* v. *Peiler* (1924), 297 Fed. 570;
*Goodyear Tire & Rubber Co.* v. *Jamaica Truck Tire Serv. Co.* (1933), 66 F. (2d) 91;
*Capital Co.* v. *Fox* (1936), 85 F. (2d) 97.

**III. The decision of the district court herein could not have been interlocutory. There was no pending proceeding in which it could have been interlocutory, and it could not be interlocutory in a criminal proceeding which might be brought in the future, or in contempt proceedings which might follow it. So far as the corporate petitioners are concerned, they could not be parties to a contempt proceeding, and on any theory the decision of the district court denying their motions was necessarily final.**

If the decision of the district court was not final, it must have been because that decision was merely a part of some other proceeding, i. e., that the order was interlocutory. The question presents itself immediately; of what other proceeding was this order a part?

There was no pending proceeding in which it could have been interlocutory. This, as we have pointed out above, is the essential distinction between the instant cases and those in which this Court has held orders of this general type not appealable. For instance, in the *Cogen* case, an indictment was pending against petitioner at the time he made his motion. This Court characterized the petitioner's proceeding as "made in the cause in advance of the trial." On the other hand, in the *Go-Bart* and *Perlman* cases no information or indictment had been found, and this Court held the orders appealable. This is in accord with the *dictum* of this Court in the *Cogen* case. "The independent character of the summary proceedings is clear, * * * wherever the motion is filed before there is any indictment or information against the movant, like the motions in *Perlman* v. *United States*, 247 U. S. 7 and

*Burdeau* v. *McDowell*, 256 U. S. 465; * * *."[17] There is an essential difference between an order of this kind made in a pending case, in which a judgment will ultimately be rendered, on the appeal from which the error in the interlocutory order may be considered, and the orders in the instant cases and the *Go-Bart*, *Perlman* and *Cudahy* cases, where nothing else was to be done in the District Court, and where the denial of the motions effectually terminated all activities of the District Court. If those orders were not final decisions, then no final decisions were to be expected and no appeal could ever bring before an appellate court the error in these particular orders.

The decision of the district court could not have been interlocutory in a criminal proceeding which might be brought in the future. Such a contention was made in the *Perlman* case, supra, and was summarily disposed of by the court by the following paragraph (pp. 12-13):

> "The second contention of the government is somewhat strange, that is, that the order granted upon its solicitation was not final as to Perlman but interlocutory in a proceeding not yet brought and depending upon it to be brought. In other words, that Perlman was powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way. We are unable to concur."

We say the same thing here. An order cannot be interlocutory in a proceeding which may or may not be brought, and which at the time exists only in the

[17] *Cogen* v. *United States*, 278 U. S. 221, 225.

realm of possibility.[18] The fact that evidence obtained in one proceeding might be used to institute another does not in itself prevent the former from being independent.

The Ninth Circuit Court of Appeals seems to have felt that these denials of the motions to quash were in some way a part of contempt proceedings against the witness that might follow in the event they should disregard the subpoenas. The mere fact that in contempt proceedings the witnesses may renew their challenge to the subpoenas (R. 64) cannot make these particular orders unappealable, unless it can be urged that the motions to quash and the contempt proceedings were all one proceeding. Clearly, however, the motions to quash and the possible future contempt proceedings are quite independent. Motions to quash involve civil proceedings; contempt proceedings may be civil or criminal or both. Motions to quash involve issues as between the litigants; contempt proceedings involve issues as between a litigant and the court. Motions to quash are initiated by the filing of the motions themselves; contempt proceedings originate in the contempt itself, are not in existence at all before the contempt occurs, and could be instituted even though no motions to quash had ever been made. The natures of the respective proceedings are or may be different, the parties are different, the origins are different, the issues are different and the times when they arise are different. To contend that the two proceedings are not independent is to state an obvious fallacy.

In the instant cases, the individual witnesses are

[18] *Go-Bart Co.* v. *United States*, 282 U. S. 344, 356.

not the only petitioners. The corporations owning the documents intervened and joined in the motions to quash, in the appeals and in this petition. Since the subpoenas were not directed to these corporate petitioners, contempt proceedings against the corporations are out of the question. The only possible way in which the rights of these corporations could be asserted in the appellate court was by the appeals which the Circuit Court of Appeals dismissed. The corporations are in the precise situation heretofore noticed by this Court. "The independent character of the summary proceedings is clear, * * * whenever the application for the papers or other property is made by a stranger to the litigation, compare *Ex parte Tiffany*, 252 U. S. 32; *Savannah* v. *Jesup*, 106 U. S. 563; *Gumbel* v. *Pitkin*, 113 U. S. 545; * * *."[19] The corporations were not parties to the subpoenas and could not be parties to any contempt proceedings. Their motions, therefore, are quite independent of the possible future contempt proceedings. The orders denying these motions are final decisions and appealable as such.

**IV. The practical arguments suggested by the Ninth Circuit Court of Appeals, and more properly addressed to Congress than to a court, in fact emphasize the incorrectness of the conclusion reached by that Court.**

As practical considerations affecting the determination of the question, the Circuit Court of Appeals for the Ninth Circuit suggested two matters: "the existence of other available methods of review and the

[19] *Cogen* v. *United States*, 278 U. S. 221, 225; *Go-Bart Co.* v. *United States*, 282 U. S. 344, 356.

delays attendant upon permitting direct appeals to be taken * * *" (R. 65). If such practical considerations could have any weight, they should appeal to a Congress considering the amendment of the statute, rather than to a court concerned solely with its application. Under the statute, if the decision is a final decision, it is appealable. There is no doubt about what is and what is not a final decision. A decision, otherwise final, is none the less final because other available methods of review exist. On the contrary, the very finality of the decision tends to exclude other methods of review. *Ex parte Tiffany*, 252 U. S. 32, 37. In the instant case, certainly, no practical weight could be given to considerations of delay. The subpoenas were originally made returnable November 10 1939 (R. 6). The appeals were argued on the next business day, November 13th (R. 59). But all practical considerations about delay vanish when we consider the suggestion of the Circuit Court of Appeals that, instead of appealing from the denial of the motions to quash, appellants should have presented their points by awaiting contempt proceedings and appealing from convictions in such proceedings (R. 64). This method would not have expedited the presentation to an appellate court of the questions about the validity of the subpoenas. It simply would have delayed that presentation by the time necessary for the contempt proceedings. If practical considerations have any weight, therefore, they are all in favor of the very course adopted by appellants in this case, after they had been sanctioned by the Circuit Court of Appeals for the Second Circuit in the *Cudahy* case.

At the heart of the government's contention in these

cases is another practical matter worthy of consideration. In all cases, including those in which difficult and intricate questions of constitutional law are involved, if the government's contention is to prevail, the subpoenaed person must first be imprisoned or fined or both before he can raise his objections. The practical result in the conduct of its investigations is clear: the subpoenaed witness cannot risk the possibility of imprisonment and is thus effectively compelled to abandon any proceeding to assert his rights—the government has effectively suppressed any objection to its technique.

## CONCLUSION

It is respectfully submitted that in these cases the decision of the Circuit Court of Appeals for the Ninth Circuit is erroneous and that the contrary decisions of the Circuit Courts of Appeals for the Second,[20] Third,[21] Seventh,[22] and Eighth [23] Circuits are correct. In these cases, therefore, the judgments should be reversed.

Respectfully submitted,

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[20] *In re Cudahy Packing Co. of Chicago, Ill.* (1939), 104 F. (2d) 658;
*In re Milburne* (1935), 77 F. (2d) 310.

[21] *Janssen* v. *Belding-Corticelli* (1936), 84 F. (2d) 577;
*Cassatt* v. *Mitchell Coal & Coke Co.* (1907), 150 Fed. 32 (Reversed on other grounds, 207 U. S. 181).

[22] *In re South State Street Bldg. Corporation* (1939), 105 F. (2d) 680.

[23] *Brownson* v. *United States* (1929), 32 F. (2d) 844.